

FILED

07/18/2023

Clerk of the
Appellate Courts

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
May 9, 2023 Session

STATE OF TENNESSEE v. ANTHONY TERRELL BROWN

Appeal from the Circuit Court for Robertson County
No. 74CC4-2020-CR-360 Dee David Gay, Judge, by Interchange

No. M2022-00729-CCA-R3-CD

Anthony Terrell Brown, Defendant, was convicted by a jury in the Robertson County Circuit Court of first degree premeditated murder. He received a sentence of life in prison without parole. On appeal, Defendant contends the trial court erred when the presiding circuit court judge appointed, by interchange, a trial judge from an adjoining district to try the case, and that the evidence is insufficient to support his conviction. After review, we affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

MATTHEW J. WILSON, J., delivered the opinion of the court, in which ROBERT L. HOLLOWAY, JR., and TIMOTHY L. EASTER, JJ., joined.

Mitchell A. Raines, Assistant Public Defender-Appellate Division (on appeal); Roger E. Nell, District Public Defender, and Dan W. Dalrymple, Assistant District Public Defender (at trial and sentencing), for the appellant, Anthony Terrell Brown.

Jonathan Skrmetti, Attorney General and Reporter; Jonathan Wardle, Senior Assistant Attorney General; and Roger D. Moore, District Attorney General pro tempore, for the appellee, State of Tennessee.

OPINION

I. Facts and Procedural History

A. Pretrial Proceedings

In September of 2020, the Robertson County Grand Jury indicted Defendant for the first degree premeditated murder of Heather Kirkwood, his former girlfriend. The circuit court case was originally assigned to the Hon. Jill Barte Ayers, at the time a circuit court judge in the 19th Judicial District.¹ Shortly before the indictment, the District Attorney General for the 19th Judicial District moved the trial court to designate a District Attorney General Pro Tempore from an adjoining district, and the trial court granted the State's motion. On October 16, 2020, Defendant appeared for his arraignment on the murder charge. On that same date, Defendant was appointed trial counsel from the 19th Judicial District Public Defender's Office. On October 19, 2020, the presiding judge for the 19th Judicial District, who was not presiding over Defendant's case, filed an order styled "ORDER OF RECUSAL." The order reads as follows:

Judge Jill Barte Ayers, and all Circuit Court Judges in the [19th] Judicial District recused themselves in the above styled case by Order dated October 16, 2020. Accordingly, the court designated Circuit Court Judge, Dee David Gay, of the [18th] Judicial District, 117 West Smith Street, Gallatin, TN 37066 to hear the matter by interchange to hear this case and to conduct all further proceedings in this matter.

Entered this 19[th] day of October, 2020.

The order was signed by Judge Kathryn Olita, the presiding judge for the 19th Judicial District.

A review of the record in this case reveals no recusal order from October 16, 2020. The docket report (commonly known as the "rule docket") from the trial court reflects that Defendant appeared in the circuit court on October 30, 2020, for a "Settlement" hearing. The Settlement hearing was rescheduled for November 13, 2020. Defendant appeared on November 13, but the Settlement hearing was again rescheduled this time for November 17, 2020, for Defendant to appear in Sumner County before Judge Gay.

¹ Judge Ayers has since been appointed to this court.

On November 16, 2020, Defendant, through counsel, filed a motion styled “Defendant’s Objection to Interchange Process,” in which counsel objected “to the method by which this case came to be before this Honorable Court situated in Sumner County.” The motion claimed that trial counsel had been “asked to consent to or agree to this arrangement” but that trial counsel declined to do so. The motion stated that because all of the judges in the 19th Judicial District had recused, “the proper and only method remaining” was for the presiding judge, who had also recused from the case, to ask the Chief Justice of the Tennessee Supreme Court to designate a judge.

On November 17, 2020, the parties appeared before Judge Gay. The trial court addressed Defendant’s motion as follows:

This is an objection—that’s what it is—to the interchange process on the basis of Rule 10B and Rule 11 of the Rules of the Supreme Court. And basically what it says is when everybody recuses themselves, the matter should be referred to the AOC and the Chief Justice for assignment of another judge.

In this particular case the presiding judge contacted my office and I indicated that I would be glad to preside over this case until it is complete. I will say had this matter gone through the process as stated here by Mr. Dalrymple and the [D]efendant, there’s a good probability we’d be – ended up with the same situation; don’t know for sure.

But I do note your objection, Mr. Dalrymple and [Defendant], and this will be made a part of the record, and we will proceed with the case as planned, and that will be the order of the Court.²

B. Trial

The State’s evidence at trial showed that in July 2020, Defendant had been dating Heather Kirkwood, the victim, for two or three years. They had lived in an apartment together in Springfield near the Electrolux plant where they both worked. The victim left Defendant and enlisted her son and his friends to move her belongings and furniture out of the apartment about July 10, 2020. She planned to return to Clarksville, where she lived before she moved into the Springfield apartment with Defendant.

² Tennessee Supreme Court Rule 10B states that “the judge shall act promptly by written order” in disposing of a motion to disqualify. However, no written order denying Defendant’s motion appears in the record.

The victim went to work the following Monday, July 13, 2020. She worked the second shift, from approximately 2:00 p.m. to 12:30 a.m. The plant had an outdoor smoking area within the perimeter fence that required badge access for entry. The victim was in the area smoking a cigarette before her shift started when Defendant approached her and whispered in her ear. Whatever Defendant said to the victim upset her because she cursed and told him to get away from her. Defendant responded with “so it’s like that now, b---h.” One of the victim’s coworkers described it as “a very aggressive moment at the time.” Defendant left the area, and the victim went inside the plant to work.

The victim took her “lunch” break at 6:30 p.m. By that time of day, most of the managers had gone home, and employees still at work would use their break times to move their cars to parking spots closer to the plant. While the victim was moving her car on her lunch break, Defendant returned to the plant and confronted her again. Defendant parked next to the victim’s car as soon as she moved it. He got into her car. Another employee witness was sitting in his own car with his girlfriend when they heard a gunshot, and then screaming. The witness observed Defendant and the victim in “a physical altercation” in the victim’s car. The victim “was yelling stop while getting pulled back into the car over and over,” like “a rag doll, pulled back inside the vehicle.” The victim cried for help when she saw the employee and his girlfriend, and then Defendant “reached up and shot her one time and shot her in the abdomen.” The victim opened the car door and fell onto the ground.

The employee then ushered his girlfriend and a pregnant female employee towards the plant, and when he looked back in the victim’s direction, he “locked eyes” with Defendant. Defendant was taking items out of the victim’s car and setting them on top of Defendant’s car, acting “[n]onchalant, like it was nothing. It was as if it was just another day.”

While Defendant was removing items from the victim’s car, she was lying on the ground, “begging and crying for help.” Two coworkers were “telling [Defendant] no, no, don’t do it.” Two other employees rushed to help the victim, but Defendant, who was still holding a gun, told the male employee to “back the eff up.” When another employee approached, the victim pleaded for his help, and Defendant told him “the best thing for you to do is walk away.” Defendant then gathered his belongings, got into his car, drove beside the victim, and shot her several more times as she was lying on the ground. After shooting the victim, Defendant “just drove right out of the parking lot.” A witness heard “tires pulling out.”

The victim's coworkers located a nursing student who was at the plant and took her to try to help the victim, but it was too late. The victim was dead. Officers with the Springfield Police Department responded to the scene and began their investigation. Soon after, Defendant's name surfaced as the suspect in the shooting. Four witnesses identified Defendant as the shooter through photographic lineups presented to them by officers. Surveillance cameras at the plant captured footage of the Defendant and the victim at key times on July 13, 2020. Videos introduced at trial showed Defendant passing through a secure turnstile at approximately 1:47 p.m. and leaving at approximately 1:56 p.m. In both videos, Defendant was wearing a reflective work vest. A video also showed the victim leaving to move her car at 6:37 p.m. Another video from the time of the shooting showed Defendant's car next to the victim's car and employees rushing to help, only to turn back after meeting Defendant. That video also shows Defendant's black Dodge Charger pulling away from the crime scene.

The autopsy of the victim revealed six gunshot wounds. One shot was in the back of the victim's shoulder. Two shots struck the victim's back, one of which fractured her spine and destroyed her kidney. Another shot entered her chest, breaking her ribs and puncturing her spleen and intestines. A fifth shot struck her in the thigh, and a sixth struck her in the abdomen, perforating her lung, liver, small intestine, and aorta. The medical examiner testified that any of the single shots would not have immediately killed the victim, but that the victim would have been conscious and able to call for help. The medical examiner stated it was a "combination of all" the shots that were fatal to the victim, and she listed the cause of the victim's death as gunshot wounds, and her manner of death as homicide.

Police officers collected physical evidence during the investigation. At the scene, officers located six .40 caliber spent shell casings. Five of the casings were found on the parking lot surface, while the sixth was recovered inside the victim's vehicle, under the rear passenger seat. A Tennessee Bureau of Investigation (TBI) Special Agent testified that all six bullets had been fired from the same .40 caliber Glock handgun. Officers never recovered the weapon used in the attack, but the victim's son testified that Defendant often carried a .40 caliber handgun. The day after the shooting, officers located the Defendant's Dodge Charger in a subdivision about two miles from the plant. In the car, officers located two Electrolux employee badges containing Defendant's information. On the backseat of the car, they found several reflective vests consistent with what Defendant was wearing the day of the shooting. Testing by a TBI Special Agent revealed material consistent with gunshot residue on the vests.

The investigation revealed that after the shooting, Defendant "swapped vehicles" with an acquaintance and drove away in the acquaintance's Nissan Xterra. Defendant was

arrested days later in Mt. Juliet, Tennessee, when a Mt. Juliet Police Department tag reader picked up the Xterra's license plate and officers conducted a traffic stop. When officers searched the Xterra, they located a jacket, hat, shirt, shoes, and razors. The jacket and hat tested positive for two of the three primary components found in gunshot primer residue.

Defendant elected not to testify or present any evidence.

The trial court instructed the jury on the law of first degree murder, as well as the lesser-included offenses of second degree murder, voluntary manslaughter, reckless homicide, and criminally negligent homicide. After the trial court instructed the jury, it began its deliberations at 2:30 p.m. on September 28, 2020. After retiring at 5:00 p.m. that day without reaching a verdict, the jury returned at 9:00 a.m. on September 29, 2020 to continue its deliberations. From the record, the jury sent the trial court several notes when it arrived at 9:00 a.m. to resume its deliberations. One note read: "What happens if we cannot come to a unanimous agreement on the first charge[?]. . . As I am interpreting, we are advised not to go against conviction to move to next charge of 2nd degree. What happens if the jury is 'hung?'" The trial court responded in writing with, "[y]ou must unanimously agree on your verdict for count one. If you can't agree—we can't move on." The trial court's written answer contains the notation of "9/29/20 . . . 9:10." A second note from the jury read, "[a]ccording to the law it is required to agree unanimously on the first charge before we can consider a lesser charge. If we cannot unanimously agree then what would be the next step?" The trial court's written response was "[s]ee answer given in other question." There is no notation as to the time or date on the second note.

Later that morning, the jury convicted Defendant as charged, and at 10:53 a.m. on September 29, 2020, the trial concluded. At the sentencing hearing, the trial court sentenced Defendant to life in prison without possibility of parole, based on his status as a repeat violent offender under Tennessee Code Annotated section 40-35-120(g).

C. Motion for New Trial

Defendant timely moved for a new trial, in which he raised several grounds. He repeated his objection to the trial judge's appointment through the interchange process, alleging "[t]he trial judge was unauthorized to preside over the trial in this case." Defendant also argued the evidence was insufficient to sustain his guilty verdict. The trial court denied Defendant's motion for new trial. This timely appeal followed.

II. Analysis

A. Interchange

Defendant contends there was reversible error in the designation of Judge Gay to preside over Defendant's trial. He argues that the presiding circuit judge failed to follow Tennessee Supreme Court Rule 10B, and should have requested the Chief Justice of the Tennessee Supreme Court to designate another judge as all the 19th Circuit judges had recused themselves. The State contends there was no error in Judge Gay's designation, and even if there was error, such error does not require reversal of Defendant's conviction.

Relevant Supreme Court Rules

Supreme Court Rule 10B, sections 1.01 and 1.04 provide, in relevant parts:

1.01. Any party seeking disqualification, recusal, or a determination of constitutional or statutory incompetence of a judge of a court of record, or a judge acting as a court of record, shall do so by written motion filed promptly after a party learns or reasonably should have learned of the facts establishing the basis for recusal. The motion shall be filed no later than ten days before trial, absent a showing of cause which must be supported by an affidavit. The motion shall be supported by an affidavit under oath or a declaration under personal knowledge and by other appropriate materials. The motion shall state, with specificity, all factual and legal grounds supporting disqualification of the judge and shall affirmatively state that it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. A party who is represented by counsel is not permitted to file a pro se motion under this rule.

....

1.04. A judge who recuses himself or herself, whether on the Court's own initiative or on motion of a party, shall not participate in selecting his or her own successor, absent the agreement of all parties. With the agreement of all parties to the case, the judge may seek an interchange in accordance with Tenn. Sup. Ct. R. 11, § VII(c)(1). Otherwise, the presiding judge of the court shall effect an interchange in accordance with Tenn. Sup. Ct. R. 11, § VII(c)(2) or (3). If an interchange cannot be effected, or if the presiding judge is the recused judge, the presiding judge shall request the designation of a judge by the Chief Justice, pursuant to Tenn. Sup. Ct. R. 11, § VII(c)(4).

The section of Supreme Court Rule 11 cited in Rule 10B states:

c. Substitute Judges. Where a judge of a trial court of record fails to attend or is unable to hold court, as provided in Tenn. Code Ann. § 17-2-118, the following procedure shall be followed, in the sequence designated, for the selection of a substitute judge.

(1) The judge shall seek interchange in accordance with Tenn. Code Ann. § 17-2-202;³

(2) The judge shall apply to the presiding judge or, if the applying judge is the presiding judge, the presiding judge pro tempore of the judicial district to effect an interchange with a judge of that judicial district in accordance with Tenn. Code Ann. § 16-2-509(c);

(3) The presiding judge or the presiding judge pro tempore of the judicial district shall effect an interchange with a judge from another judicial district in accordance with Tenn. Code Ann. § 16-2-509(d);⁴

(4) The presiding judge or the presiding judge pro tempore shall request from the director of the Administrative Office of the Courts the designation of a judge by the Chief Justice, in accordance with Tenn. Sup. Ct. R. 10B, § 1.04, Tenn. Code

³ (a) Each state trial court judge has an affirmative duty to interchange if:

(1) A judge has died or is unable to hold court;

(2) Two (2) or more judges have agreed to a mutually convenient interchange; or

(3) The chief justice of the supreme court has assigned by order a judge to another court pursuant to Tenn. Sup. Ct. R. 11.

⁴ (d) If a presiding judge is unable to correct a caseload imbalance or reduce docket delays utilizing the available judges within the district over which the judge presides, it is the affirmative duty of the presiding judge to contact other presiding judges and request assistance or contact the supreme court and request assistance pursuant to § 16-3-502.

Ann. §§ 16-3-502(3)(A) and 17-2-110. The presiding judge or presiding judge pro tempore shall use the designation request form appended at the end of Tenn. Sup. Ct. R. 10B.

Tenn. Sup. Ct. R. 11, § VII(c)(1)-(4).

We observe that Rule 10B requires that any motion to disqualify a trial court judge or a judge “acting as a court of record . . . shall be supported by an affidavit under oath or a declaration under penalty of perjury on personal knowledge and by other appropriate materials.” Tenn. Sup. Ct. R. 10B, § 1.01. Additionally, Rule 10B requires that any disqualification motion “shall affirmatively state that it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.” *Id.* Defendant’s “objection to interchange” filing was, ultimately, a motion to disqualify Judge Gay under Rule 10B, and in our view, Defendant’s motion was required to contain these elements. Defendant’s filing contained neither an affidavit nor a declaration under penalty of perjury. It also lacked the affirmation required by Section 1.01. As such, Defendant failed to follow the requirements of the Rule.

Further, Rule 10B, section 1.01, requires that the motion to disqualify be filed “*promptly* after a party learns or reasonably should have learned of the facts establishing the basis for recusal.” (emphasis added). A case from our Court of Appeals provides guidance on the issue of promptness. In *Jackson v. Lanphere*, No. M2010-01401-COA-R3-CV, 2011 WL 3566978 (Tenn. Ct. App. Aug. 12, 2011), one litigant objected to the appointment of a special judge to hear the case. Yet the objecting litigant did not object to the appointment of the special judge at the initial appearance date or in another hearing held eight days later; the litigant’s “motion to reconsider” in which she first objected to the special judge’s appointment was filed twelve days after the initial appearance. *See id.* at *5. The Court of Appeals “conclude[d] the issue of [the interchange judge]’s appointment was waived.” *Id.* Here, Defendant was appointed counsel at his arraignment on October 16, 2020. He appeared in court twice, on October 30, 2020, and November 13, 2020, before objecting to the interchange order on November 16, 2020, through his written motion. He could have raised the issue earlier, but he did not. We conclude this issue is waived, as Defendant did not act promptly in challenging the interchange order and seeking the recusal of Judge Gay, as is required by Rule 10B, section 1.01. *See* Tenn. R. App. P. 36(a); *see In re Valentine*, 79 S.W.3d 539, 545 (Tenn. 2002).

Waiver notwithstanding, we will discuss the interchange issue on the merits. In support of his argument, Defendant cites to our unpublished opinion in *Lloyd v. State*, No. M2015-00295-CCA-R3-PC, 2016 WL 990457 (Tenn. Crim. App., Mar. 15, 2016) (“*Lloyd*”). In that case, after the judge to whom the case was assigned retired, the presiding

judge of the 13th Judicial District (where the case was heard) issued an order stating the judges in the judicial district had recused themselves and transferred the case to a judge in another judicial district, who had agreed to hear the case by interchange. *Id.* at *2. The petitioner then filed a motion “seeking recusal of all the judges in the 13th Judicial District and expressing his displeasure that [the presiding judge] had selected a judge to preside over his case rather than allowing the selection to be made by the Chief Justice of the Tennessee Supreme Court.” *Id.* The judge sitting by interchange did not address the motion before filing an order dismissing the post-conviction petition without a hearing. *Id.* at *2-3.

On appeal, we remanded the case to the post-conviction court. *Id.* at *5. We concluded the petitioner’s pro se post-conviction petition stated colorable claims for relief, and the post-conviction court should not have dismissed the petitioner’s claims because the claims “could not have been appropriately assessed without evidence that obviously would not be in the record of the proceedings.” *Id.* at *4. As relevant to the current case, we also observed, “[b]ecause [the presiding judge] had recused herself, Rule 10B required that she ask the Chief Justice to designate a judge to preside over the petitioner’s case. Upon remand, therefore, the presiding judge of the 13th Judicial District shall request designation of a judge to preside over the petitioner’s case.” *Id.* at *5.

We acknowledge the presiding judge’s order in this case resembles the one issued by the presiding judge in *Lloyd*. Both orders announced that the judges of one judicial district had recused themselves and identified a judge from another judicial district who had agreed to preside over the case by interchange. Yet this case is different. Defendant’s case can be distinguished from *Lloyd* in several respects. First, *Lloyd* was a post-conviction case in which this court reversed the post-conviction court’s judgment because the judge sitting by interchange dismissed the petition without a hearing despite the petition’s stating a colorable claim for relief. *Id.* at *4. The designation of the judge to sit by interchange in *Lloyd* was to be corrected upon remand—the designation did not cause the case to be remanded. Indeed, we focused on the petitioner’s colorable claim for post-conviction relief. There, the post-conviction court “entered a preliminary order, finding that the petitioner had presented a colorable claim for post-conviction relief.” *Id.* at *1. The post-conviction court also stated that it would “set this matter for a full hearing.” *Id.* at *2. When the judge presiding over the petitioner’s case retired, and the case came before a new judge, “the post-conviction court entered an order denying post-conviction relief without a hearing on the record.” *Id.* at *2. Perhaps more importantly, in *Lloyd* the State conceded the post-conviction court erred in dismissing the case without an evidentiary hearing, and the State did not address the interchange issue in its brief to this court. There is no such concession from the State in this case.

Here, the State asserts Judge Gay’s presiding over this case by interchange was proper. The State first argues that the interchange was proper because the presiding judge followed the requirements of Supreme Court Rule 11 and because the record was unclear as to whether the presiding judge had recused herself before entering the interchange order. It is true there is no proof that the purported October 16 order in which the circuit court judges supposedly recused themselves was filed, as no such order appears in the record of this appeal or is referenced in the circuit court’s rule docket. The record also suggests the presiding judge and Judge Gay had reached an agreement for him to hear the case before the October 19th order. The language of the October 19th order shows this agreement had taken place between the presiding judge and Judge Gay, when it reads “[a]ccordingly, the court *designated* Circuit Court Judge Dee David Gay, . . . to hear the matter by interchange to hear this case and to conduct all further proceedings in this matter.” (emphasis added). The transcript from the November 17th hearing also supports this proposition, when Judge Gay said “[i]n this particular case the presiding judge contacted my office and I indicated that I would be glad to preside over this case until it is complete.”

The unpublished opinion in *Lloyd* does not bind us, as that case was in a different posture. But we turn to the language of Supreme Court Rules 10B and 11, section VII(c)(3). In a perfect world, an order for interchange would have preceded the order recusing all the judges of the district. Here, the presiding judge did attempt to comply with the Rules, and may have done so. It is just unclear from the record. We are unable to conclude whether the presiding judge’s actions strictly complied with the Rules.

Yet even if there were error in the interchange process, the State also argues that Judge Gay’s presiding over this case was proper because he was serving as a *de facto* judge, acting under good faith, and that there is no proof in the record that his presiding over this case otherwise denied Petitioner’s right to a fair trial before a fair and impartial judge. We agree.

Tennessee’s appellate courts have recognized that a procedural error in the appointment of a judge “is not necessarily fatal.” *State ex rel. Williams v. Woods*, 530 S.W.3d 129, 138 (Tenn. Ct. App. 2017) (citing *Ferrell v. Cigna Prop. & Cas. Ins. Co.*, 33 S.W.3d 731, 739 (Tenn. 2000) and *In re M.A.P.*, No. W2008-01352-COA-R3-PT, 2009 WL 2003357, at *13 n.11 (Tenn. Ct. App. July 10, 2009)). “If a judge is acting under the color of law absent bad faith, the special judge may serve as a *de facto* judge, and his or her acts will be binding on the parties.” *Woods*, 530 S.W.3d at 138 (citing *Ferrell*, 33 S.W.3d at 739; *In re M.A.P.*, 2009 WL 2003357, at 13 n.11). “A judge *de facto* is one acting with color of right and who is regarded as, and has the reputation of, exercising the judicial function he assumes.” *Ferrell*, 33 S.W.3d at 739 (quoting *State ex rel. Newsom v. Biggers*, 911 S.W.2d 715, 718 (Tenn. 1995)).

So if there were procedural errors in this case, the pivotal question is what material impact did it have on Defendant? We are guided by one of our recent decisions, *State v. Gray*, No. E2021-01134-CCA-R3-CD, 2022 WL 17332569 (Tenn. Crim. App., Nov. 30, 2022), on the issue of interchange. In *Gray*, the Bradley County Juvenile Court designated a juvenile magistrate judge to preside over the defendant’s transfer hearing to adult court. *Id.* at *1. Once transferred, the defendant was convicted of aggravated robbery, felony theft, burglary of an automobile, and misdemeanor theft. *Id.* We found the juvenile court had failed to comply with the interchange procedures of Tennessee Supreme Court Rule 11 when it designated the magistrate judge to preside over the transfer hearing. *Id.* at *11. Still, we found that “procedural errors in [that] case [did] not require reversal.” First, the violation of “statutory procedures for appointment of a substitute judge [could not] be said to have had a material impact on the outcome of the Defendant’s case” because “the record [was] sufficient to show that the “due process error in [that] case was harmless beyond a reasonable doubt.” *Id.* (citing *Sawyers v. State*, 814 S.W.2d 725, 729 (Tenn. 1991)). Additionally, the substitute judge “served as a *de facto* judge acting under the color of law,” and, therefore, “the Defendant [was] not entitled to relief.” *Id.* at *11.

In *Ferrell*, a Tennessee Supreme Court opinion cited by the State, the presiding judge of a judicial district entered a standing order designating that district’s clerk and master to serve as a circuit judge pro tempore in all workers’ compensation cases. *Ferrell*, 33 S.W.3d at 736. Our supreme court observed that while two Tennessee statutes permit a circuit court to appoint a clerk and master as a special judge in some cases, those statutes could “not be read in isolation,” given the existence of statutes providing for interchange and the appointment of a special judge by the Tennessee Supreme Court. *Id.* at 738-39 (footnote omitted). The supreme court concluded the trial court did not follow the proper procedure for appointing the judicial district’s clerk and master as special judge, because “the order of appointment should be either for a definite period of time or for a specific case. A standing order appointing a clerk and master as special/substitute judge to hear an entire class of cases is not appropriate.” *Id.* at 739 (footnote omitted). Still, the supreme court concluded this procedural irregularity did not require reversal of the case: “the Clerk and Master unquestionably was acting under color of right. Two statutes authorize the appointment of clerks and masters as special judges. Moreover, the parties consented to the appointment and [did] not object[] on appeal.” *Id.*

After *Ferrell*, other appellate courts have concluded that procedural errors in the appointment of a judge do not require reversal when the judicial officer was acting as a *de facto* judge. See, e.g., *Williams*, 558 S.W.3d at 137-39 (juvenile court judge did not sign order appointing attorney who heard case as special judge; procedural deficiency did not require reversal because there was “no evidence contained in the record that the special

judge operated in bad faith”); *In re Estate of Ellis*, No. W2019-02121-COA-R3-CV, 2020 WL 7334392, at *5-7 (Tenn. Ct. App. Dec. 14, 2020) (probate court judge signed order announcing recusal and transferring case to circuit court by interchange violated Rule 10B’s mandate that recused judge may not choose successor; nothing prevented circuit court *judge* from acting as de facto probate court judge, but transfer of case to circuit *court*, which had no jurisdiction to hear probate court matters, required reversal); *Lanphere*, 2011 WL 35665978, at *4-5 (order appointing general sessions judge to sit for chancellor by interchange improper because general sessions judge is not a state court judge; although general sessions judge “was without actual authority to act as chancellor by interchange,” reversal not required because sessions judge acted as judge *de facto*).

The same is true in this case. Here, there is nothing in the record to suggest that Defendant did not receive full and fair proceedings in the trial court. Judge Gay acted as a *de facto* judge in this case. He was a duly elected criminal court judge in an adjoining district. At the time of the trial, he had been a criminal court judge for approximately fifteen years. www.tncourts.gov/courts/judges/dee-david-gay. He agreed with the presiding judge in the 19th Judicial District to hear the case, which was confirmed by the presiding judge’s written order. Clearly, Judge Gay was “acting with color of right and who is regarded as, and [had] the reputation of, exercising the judicial function he assumes.” *Ferrell*, 33 S.W.3d at 739. Judge Gay did not seek to insert himself into the narrative of the case; rather, he was assisting his colleagues from the 19th Judicial District. He applied the only legal sentence for Defendant’s conviction. Defendant makes no allegation that Judge Gay was prejudiced against him or that the judge would have faced disqualification on grounds separate from the procedural issues here—nor has this court found any evidence that would support these conclusions. In other words, Defendant cannot show how the outcome of his case would have been different if another judge had presided over his trial. In this case, Judge Gay was clearly acting under color of right and in good faith.

Defendant argues that Judge Gay could not have been a *de facto* judge because Defendant did not consent to Judge Gay’s presiding over the case given the procedural irregularities explored above. This court acknowledges that in two reported opinions cited above, the courts’ conclusions that the persons presiding over the case were *de facto* judges had no objections from the parties to the judges’ exercise of judicial authority. *See Ferrell*, 33 S.W.3d at 739; *Williams*, 530 S.W.3d at 138-39. Even so, this court agrees with the State that consent of the parties is unnecessary for a court to find the existence of a *de facto* judge. This court specifically notes that in *Lanphere*, one of the litigants challenged the appointment of a special judge both in the trial court and on appeal. *See* 2011 WL 3566978, at *5. Thus, Defendant’s challenge to the State’s claim that Judge Gay was a *de facto* judge does not affect this court’s disposition on the issue.

Defendant also argues that the Court of Appeals' opinion in *Maxwell Med., Inc. v. Chumley*, 282 S.W.3d 893, 898 (Tenn. Ct. App. 2008), compels this court to reverse Defendant's conviction based on the violation of Supreme Court Rules 10B and 11 and the corresponding statutes. In *Chumley*, the Court of Appeals reversed a chancery court's grant of summary judgment where the order was entered by a clerk and master appointed special judge. *Id.* The Court of Appeals acknowledged the Tennessee Supreme Court's opinion in *Ferrell*, in which a clerk and master was found to be a *de facto* judge despite the failure to follow statutory provisions for designating a clerk and master as special judge, but the Court of Appeals stated:

As we read *Ferrell*, the proper procedures for appointing a special judge are mandatory. It is the duty of the Trial Court to comply with these requirements. If the procedural requirements to appoint a special judge are not met and our Court upholds the judgment of the judge not properly designated, the mandates of *Ferrell* and the Supreme Court Rule 10 become meaningless. We give force and effect to *Ferrell* and its mandates, and are constrained to vacate the Judgment of the Trial Court and remand for further proceedings in accordance with this Opinion.

Id.

Defendant contends that *Maxwell Medical* makes clear that for the Supreme Court Rules to have any meaning, the procedural error in affecting the interchange in his case requires his convictions to be reversed—particularly after this court's opinion in *Lloyd*. However, both *Maxwell Medical* and *Lloyd* dealt with the summary dismissal of a case rather than the reversal of a jury verdict, and as stated above, in *Lloyd* our reversal of the post-conviction court's order was based on the court's improper dismissal of the case. Again, the procedural issues of interchange were to be resolved on remand—they were not the cause of the remand.

Based on the above analysis, we conclude Judge Gay was acting as a *de facto* judge during Defendant's trial court proceedings, and therefore if there were any procedural irregularities in the interchange process they do not require reversal.

As stated above, we conclude Defendant did not follow the above-identified provisions of the Rules strictly, in failing to raise his objection to the interchange promptly, and filed a motion lacking the required affirmation, the required affidavit, and the required declaration under penalty of perjury. Accordingly, his objection to Judge Gay's designation is waived. Even if the issue was not waived, Defendant's arguments would

not constitute reversible error, as Judge Gay acted as a *de facto* judge in presiding over this case, and any error is harmless. Defendant is not entitled to relief on this issue.

B. Sufficiency

On appeal, Defendant argues that there is insufficient evidence to support his conviction for first degree murder. Defendant does not contest shooting the victim, but he essentially argues the evidence shows a “passionate exchange,” negating any proof of premeditation. The State argues the evidence was sufficient to sustain the jury’s verdict.

The standard of review of a claim challenging the sufficiency of the evidence is “whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (citing *Johnson v. Louisiana*, 406 U.S. 356, 362 (1972)); *see* Tenn. R. App. P. 13(e); *State v. Davis*, 354 S.W.3d 718, 729 (Tenn. 2011). This standard of review is identical whether the conviction is predicated on direct or circumstantial evidence, or a combination of both. *State v. Williams*, 558 S.W.3d 633, 638 (Tenn. 2018) (citing *State v. Dorantes*, 331 S.W.3d 370, 379 (Tenn. 2011)).

A guilty verdict removes the presumption of innocence and replaces it with one of guilt on appeal, therefore, the burden is shifted to the defendant to prove why the evidence is insufficient to support the conviction. *Davis*, 354 S.W.3d at 729 (citing *State v. Sisk*, 343 S.W.3d 60, 65 (Tenn. 2011)). On appeal, “we afford the prosecution the strongest legitimate view of the evidence as well as all reasonable and legitimate inferences which may be drawn therefrom.” *Id.* at 729 (quoting *State v. Majors*, 318 S.W.3d 850, 857 (Tenn. 2010)); *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978). In a jury trial, questions involving the credibility of the witnesses and the weight and value to be given to evidence, as well as all factual disputes raised by such evidence, are resolved by the jury as the trier of fact. *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *State v. Pruett*, 788 S.W.2d 405, 410 (Tenn. 1990). Therefore, we are precluded from re-weighing or reconsidering the evidence when evaluating the convicting proof. *State v. Stephens*, 521 S.W.3d 718, 724 (Tenn. 2017).

Here, Defendant was charged with and convicted of first degree murder. As charged, “first degree murder is: [a] premeditated and intentional killing of another[.]” Tenn. Code Ann. § 39-13-202(a)(1). A person acts intentionally “when it is the person’s conscious objective or desire to engage in the conduct or cause the result.” Tenn. Code Ann. § 39-11-302(a). Premeditation is defined in Tennessee Code Annotated section 39-13-202(e) as:

An act done after the exercise of reflection and judgment. “Premeditation” means that the intent to kill must have been formed prior to the act itself. It is not necessary that the purpose to kill preexist in the mind of the accused for any definite period of time. The mental state of the accused at the time the accused allegedly decided to kill must be carefully considered in order to determine whether the accused was sufficiently free from excitement and passion as to be capable of premeditation.

“The element of premeditation is a factual question to be decided by a jury from all the circumstances surrounding the killing.” *State v. Jackson*, 173, S.W.3d 401, 408 (Tenn. 2005) (citing *State v. Davidson*, 121 S.W.3d 600, 614 (Tenn. 2003)). The jury “may infer premeditation from the manner and circumstances of the killing.” *Id.* (citing *Bland*, 958 S.W. 2d at 660). Among the circumstances that may support a finding of premeditation are:

[E]vidence of procurement of a weapon, the use of a deadly weapon upon an unarmed victim, the particular cruelty of the killing, infliction of multiple wounds, preparation before the killing for concealment of the crime, destruction or secretion of evidence of the murder, and calmness immediately after the killing.

Id. at 409 (quoting *State v. Nichols*, 24 S.W.3d 297, 302 (Tenn. 2000)). “If the killing is accomplished by . . . lying in wait, premeditation is obvious.” *State v. Bullington*, 532 S.W.2d 556, 560 (Tenn. 1976). Additionally, a jury may infer premeditation from a lack of provocation by the victim and the defendant’s failure to render aid to the victim. *See State v. Lewis*, 36 S.W.3d 88, 96 (Tenn. Crim. App. 2000).

We conclude that the evidence viewed in the light most favorable to the State proves Defendant’s killing of the victim was premeditated. He entered the plant at 1:47 p.m., where he had a verbal confrontation with the victim. After it was apparent she was rebuffing his advances, he left the plant about nine minutes later. After nearly five hours, it was Defendant who approached the victim, first pulling his car alongside her car. And it was Defendant who got into the victim’s car with a firearm. A struggle ensued in the backseat and Defendant shot her at least once. As the victim attempted to escape Defendant’s attack, he repeatedly pulled her back into the car. He then shot her. When she managed to escape the car, she fell to the pavement with a gunshot wound to her abdomen. As the victim pleaded for help from her coworkers, Defendant rendered no aid to her, but chose to gather his belongings from her car and warn the coworkers not to interfere. While he was doing this, his attitude was indifferent, or as a witness testified, “[n]onchalant, like it was nothing. It was as if it was just another day.” At this point, the

victim was still alive and crying for help. After taking the time to gather his things and moving them from her car to his, it took additional time for Defendant to get into his car, pull it beside her, and shoot her several more times, killing her. Later, Defendant switched cars with an acquaintance and disposed of the weapon he used to kill the victim. All these facts support the jury's finding Defendant acted with premeditation.

In his brief, Defendant asserts that “the jury twice informed the trial court it was deadlocked,” and he argues this weakens the sufficiency of premeditation. First, we do not conclude the record supports Defendant's assertion. The jury's first note cited by Defendant is a conditional question—they asked, “What happens *if* the jury is hung.?” (emphasis added). The second jury note cited by Defendant reads, “*if* we cannot unanimously agree then what would be the next step?” (emphasis added). This note is also conditional, and there is no indication the jury was deadlocked. Even if the jury had deadlocked, the trial court's response was a correct recitation of the law, and Defendant cites no cases to the contrary. Regardless, the jury reached its verdict, and the record reflects its notes were part of a deliberative process. This court is also unaware of any precedent stating that a jury's difficulty in reaching a verdict—evinced by lengthy deliberations or questions to the trial court—reflects the lack of sufficient proof to convict.

We conclude the evidence is sufficient to support Defendant's first degree murder conviction, and he is not entitled to relief on this issue.

III. Conclusion

Based on the foregoing analysis and the record as a whole, we affirm the judgment of the trial court.

MATTHEW J. WILSON, JUDGE